IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present
Madam Justice Kashefa Hussain

Civil Revision No. 3582 of 2014

Md. Shah Jalal Khan and another
.....petitioners
-Versus-
Jalal Mir and others
------- Opposite parties
Mr. Swapan Kumar Dutta, Advocate
------ For the petitioners
Mr. Humayun Kabir Sikder, Advocate
------- For the Opposite Parties.

Heard on: 15.10.2018, 21.10.2018,
22.10.2018, 24.10.2018 and
Judgment on 29.10.2018

The supplementary affidavit filed by the petitioners do form part of the main petition.

Rule was issued calling upon the opposite party No. 1-5 to show cause as to why the impugned Judgment and decree dated 04.05.2014 passed by learned Additional District Judge, Barguna in Title Appeal No. 74 of 2011 dismissing the same and affirming the judgment and decree dated 29.09.2011 passed by the learned Assistant Judge, Betagi, Barguna in Title Suit No. 81 of 2008 dismissing the suit should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

Facts relevant for the disposal of the Rule in short is that the present petitioners as plaintiffs instituted Title Suit No. 81 of 2008 before the court Assistant Judge, Betagi, Barguna praying for declaration of title impleading the present opposite parties as defendants. The trial Court upon hearing the suit pursuant to adducing evidences and taking depositions etc dismissed the suit against the plaintiffs by its judgment and decree dated 29.09.2011. Being aggrieved by the judgment and decree of the Trial Court dated 29.09.2011, the plaintiff as appellant (petitioner in this instant civil revision) preferred an appeal being Title Appeal No. 74 of 2011 before the court of District Judge, Barguna which appeal was ultimately heard and disposed of by the Additional District Judge, Barguna. Upon hearing the contending parties, the court of additional District Judge dismissed the Appeal of the plaintiff appellant and affirmed the judgment and decree of the Trial Court by its judgment and decree dated 04.05.2014. Being aggrieved by the judgment and decree of the District Judge, Barguna dated 04.05.2014 the plaintiff appellants as petitioners filed the instant civil reivisional application which is before me for disposal.

Although the matter appeared for several days for hearing in the cause list with the name of the advocates of both sides yet when the matter was taken up for hearing none appears for the petitioners. However, learned advocate Mr. Humayun Kabir

Sikder appear for the opposite parties No. 1-4 For ends of justice, I am inclined to dispose of the Rule upon hearing the opposite parties.

Learned Advocate Mr. Humayun Kabir Sikder for the opposite parties submits that both the courts below correctly came to their findings upon correct appraisal of evidences and taking depositions of witnesses and also taking all the facts and circumstances into consideration. Therefore he submits that the judgment of the court below being correctly given calls for no interference.

By way of elaborating his submissions he argues that it is the case of the plaintiffs that the deed dated 29.05.1977 was obtained by the defendants through collusion and fraud. In this context he contends that although in the plaint the plaintiff stated that the deed No. 2473 of 29.05.1977 executed between the predecessors of the plaintiff-appellant-petitioners and the predecessors of the defendant-respondent-opposite parties was executed but yet the petitioners did not file any suit praying for cancellation of the deed. He submits that the plaintiffs in their plaint rather only prayed for that the judgment and decree dated 31.03.1980 (decree signed on 07.04.1980) of the title suit No. 466 of 1978 is forged, fraudulent, collusive, inoperative and not binding upon them praying for a declaration to the effect. He contends that the petitioners however did not pray for

cancellation of the deed 2473 dated 29.05.1977 which should have been their prayer in the suit. He submits that the deed 2473 dated 12.11.1981 not being challenged the earlier judgment is neither sustainable nor maintainable. He takes me to the judgment of the courts below and draws my attention to the fact that both the courts arrived upon a concurrent finding on the issue of possession of the suit land by the defendant respondent opposite parties since long 33 years. He also draws my attention to the depositions of the PW-1s contending that in his deposition the PW-1 could not specify the land from which the plaintiffs claim title. He also submits that the learned courts in their findings also stated that in the schedule of the property the suit land is not clearly described and specified. He continues that in the absence of clear specification of the suit land in the schedule the suit is not maintainable in limine. He further contends that although the petitioners source to their claim and title arise out of Judgment and Order in a preemption suit being Preemption suit No. 157 of 1977 and Judgment and order dated 06.05.1978, but yet there is nothing in the records or anywhere else to show that the judgment and order in that preemption case was ever acted upon. He also submits that there is considerable uncertainty and vagueness as to how the plaintiff may benefit by dint of the judgment and order in the preemption suit. He continues his assertion upon submitting that the courts found that the plaintiff-appellant-petitioners could not produce any documents relating

to title for example rent receipts, document relating to mutation etc. Moreover he argues that there are no documents produced by the plaintiffs which could show or indicate delivery of possession of the suit land pursuant to the judgment and order in the preemption suit. On the issue of non maintainability of a suit without filing a regular suit for cancellation of deed, the learned advocate for the opposite parties cited before me a decision of our Apex Court in the case of Abdur Rashid and ors. Vs. Abdul Bashir and ors reported in 20 BLD (AD) 2000 page 262. He concluded his submissions upon assertion that taking all these factors and circumstances into consideration the courts below correctly came upon their findings and by correct judgments and order dismissed the suit against the plaintiffs and therefore the Rule bears no merit and ought to be discharged for ends of justice.

Heard the learned Advocate for the opposite parties, I have perused all the materials and records including the decision cited before me. From perusal of the Judgment and orders of the courts below and from the records it appears that the preemption suit No. 157 of 1977 was filed by the predecessor of the petitioners where in judgment and order was passed dated 06.5.1978. It appears that the plaintiff's claim to Title arises from the judgment and order in the preemption suit. But however I do not find anything in the records to show that pursuant to the

judgment and order in the preemption suit there was any delivery of possession of the suit land to the plaintiffs. There is nothing from the records to indicate that the judgments and orders were ever acted upon. The plaintiffs-appellant-petitioners could not produce any document to prove delivery of possession and ownership to the suit land by them at any stage during trial. It is the plaintiff's case and claim that Title suit No. 466 of 1978 filed by the defendant and in which ex parte Judgment and decree was passed vide judgment and decree dated 30.3.1980 regarding which the plaintiff's case is that this judgment and decree was obtained by the defendants through collusion and fraud and the plaintiffs were not made a party to the suit and no summons was served upon them. Upon a query from the court the learned Advocate for the opposite parties submits that since the plaintiffs were not even parties to the suit in Title Suit No. 466 of 1978 therefore the question of service of summons upon them is immaterial and does not arise under the circumstances.

I have also found from the records that the plaintiffs could not produce any documents relating to title and it is also found that the schedule of the suit land is not clearly specified. It also appears from the record that the PWs in their depositions could not depose or show anything in support of their title and failed to specify the suit land. Further the plaintiffs could not at any stage prove that the signature of Hatem Ali was false and forged. It is

also clear from the records that the plaintiff's suit was for a simple declaration that the judgment and decree dated 31.03.1980 is forged, fraudulent and collusive and not binding upon them. But it is also clear that the plaintiffs did not challenge the registered deed 2473 dated 12.11.1981 obtained through the courts. It is evident that before challenging the judgment and order in Title suit No. 466 of 1978 dated 31.3.1980 the plaintiffs ought to have challenged the deed which evidently gave rise to that order and through which the defendants claim title. But as is apparent from the records the deed 2473 dated 12.11.1981 was never challenged in court. I have perused the decision of our Apex Court cited by the learned Advocate for the opposite parties reported in 20 BLD (AD) 2000 page 262. The relevant principle in that case is reproduced here under:

> *Simple suit for setting aside the decree without filing a regular suit for cancellation of registered deed obtained through court is not maintainable.*

I am in respectful agreement with the judgment of our Apex Court which is binding upon me and I find force in the submissions of the learned Advocate for the opposite parties that the principle cited by the Apex Court is applicable to the case before me for disposal.

On the point of limitation the Appellate Court found that the suit is barred by limitation. The Trial Court however opined that since the case has no merits on other issues, therefore even if the suit is not barred by limitation , the suit is liable to dismissed upon merits on other issues and leaves it at that. I am of the considered opinion that the Court below ought to have given a more definite and specific finding on limitation since it was framed as an issue in the suit being Issue No 2. But nevertheless, it is also a fact that since the suit and the Appeal has been correctly decided upon in other issues on merits, the point of limitation need not be taken further by me at this stage.

Be that as it may, under the facts and circumstances I am of the considered view that the plaintiffs having failed to prove their case by any documents and evidences or in any manner, by way of depositions and moreover the suit not having been filed for cancellation of the deed 2473 dated 12.11.1981 by which the defendant had obtained the judgment and order to the court dated 31.3.1980 therefore the suit is not maintainable it is present from. Hence the findings of the Court's below being correctly given I find no reason to interfere with those. I am of the considered opinion that the Judgment and decree dated 04.05.2014 passed by learned Additional District Judge, Barguna in Title Appeal No. 74 of 2011 dismissing the same and affirming the judgment and decree dated 29.09.2011 passed by the learned Assistant

Judge, Betagi, Barguna in Title Suit No. 81 of 2008 dismissing the suit is correct.

In the result the Rule is discharged without any order as to cost.

Order of status-quo granted earlier by this court is hereby recalled and vacated.

Send down the lower Court records at once.

Communicate the order at once.

Shokat (A.B.O)